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In the

Supreme Court of the United States

JANET RENO, Attorney General of the United States, *et al.*,

Petitioner,

--v.--

KIM HO MA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE CATHOLIC LEGAL IMMIGRATION NETWORK, INC., FLORIDA IMMIGRANT ADVOCACY CENTER, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE ASIAN LAW CAUCUS IN SUPPORT OF THE JUDGMENT BELOW

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INTEREST OF THE AMICI CURIAE[1]

The Catholic Legal Immigration Network, Inc. (CLINIC), a subsidiary of the U.S. Catholic Conference, is a nonprofit agency that provides support to approximately 130 Catholic charitable immigration programs nationwide. It directly represents immigrants in Immigration and Naturalization Service (INS) detention in seven sites and, since 1998, has administered a national program to support and represent immigrants held indefinitely in INS detention. CLINIC submits this amicus brief to illustrate the experiences of its attorneys with INS's custody review process and the failure of the procedures to provide minimal fairness and genuine consideration in custody decision-making.

The Florida Immigrant Advocacy Center (FIAC) is a nonprofit organization whose mission is to promote the human rights of immigrants through legal services. FIAC's attorneys have represented many indefinitely detained immigrants in their pursuit of release from INS detention. FIAC has continuously documented and reported on treatment of INS detainees and conditions of detention at Krome Service Processing Center in Miami and in Florida's county jails. In FIAC's experience, the INS's custody review procedures routinely fail to ensure that indefinite

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[1] This brief *amici curiae* is filed with the written consent of all parties, which is on file with the Clerk of the Court. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission. *See* Supreme Court Rule 37.

detainees receive fair and full reviews of their cases.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 10,000 attorneys. NACDL is affiliated with the state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure, and, as such, it speaks for more than 28,000 criminal defense lawyers nationwide. NACDL lawyers have represented hundreds of indefinite detainees in the INS custody review process and succeeded in winning federal habeas relief for many of them.

The Asian Law Caucus (ALC) is the nation's oldest legal and civil rights organization serving the low-income Asian Pacific American communities. The Southeast Asian Immigrants' Rights Project at ALC has represented dozens of indefinite detainees at custody reviews and performed legislative advocacy on a national basis regarding the unfairness of indefinite detention.

INTRODUCTION

On any given day, the INS detains approximately 5,000 persons who cannot be deported because their countries will not accept them.[2] This

[2] Catholic Legal Immigration Network, Inc., *The Needless Detention of Immigrants in the United States*, Report 4, Aug. 2000, at 45 (visited Dec. 19, 2000) < http://www.cliniclegal.org/atriskrprt.htm> (hereafter, "*Needless Detention*") (username: clinicsf, password: 94104). These individuals include: 1) detainees from countries that do not have diplomatic ties with the United States (e.g., Cuba); 2) detainees from countries that do not have repatriation agreements with the United States and that will not accept them because of their criminal convictions (e.g., Vietnam, Laos and Cambodia); 3) detainees who are stateless (e.g., Palestinians) or from countries without a functioning government; 4) detainees granted relief under the Convention Against Torture but not released from detention; and 5) detainees whose countries refuse to issue travel documents although there is no legal barrier to doing so.

"lifer" population ballooned after the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996[3] ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[4] ("IIRIRA"), which greatly broadened the crimes for which non-citizens may be deported, made the new grounds of deportability retroactive, and eliminated previously available discretionary relief from deportation. Under current practice, these indefinite detainees are released only if the INS determines them to be not a danger to the community or a flight risk.

This brief *amici curiae* summarizes the reality of the INS's custody review procedures for INS detainees with final removal orders. The government relies heavily on the existence of these administrative custody reviews to argue that Mr. Kim Ho Ma's detention is not excessive. Aside from the fact that no amount of process can cure a substantive due process violation, the amici demonstrate below how, in practice, the process does not protect our clients from erroneous, arbitrary and unnecessary deprivations of liberty.

The amici illustrate, through the case examples

[3] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

[4] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996).

of the people whom we have represented, how the custody review procedures, along with the harsh conditions of INS detention facilities, combine to deprive persons of liberty for years on end. Despite the government's stated release procedures, detainees continue to be detained in violation of their due process rights.

EXPERIENCE OF THE AMICI CURIAE WITH THE INS CUSTODY REVIEW PROCESS

The following cases are representative of the serious shortcomings in the custody review process experienced by the many clients of the amici.

Case #1: Thanh Cao Nguyen, a Vietnamese citizen and former lawful permanent resident, was held in INS detention for three and a half years before the INS performed a review of his custody status.[5] Over the course of his detention, INS transferred him five times to five different facilities in southern California, northern California, Minnesota, and, ultimately, Florida -- far from his only family members in California.[6] Because the INS failed to forward Mr. Nguyen's mail, he missed an appeal deadline in a pro se federal case he brought to challenge his indefinite

[5] Documents regarding detention conditions and the INS custody review process are lodged with the Clerk of this Court. They will be referred to in this brief as "L"- followed by the lodging page number. L-144 (petition for writ of habeas corpus).

[6] L-147-149 (petition for writ of habeas corpus).

detention.[7]

While in Florida, Mr. Nguyen was one of the few INS administrative detainees held in the Coleman state prison. He spent one year confined to a small cell in administrative isolation under 23-hour lockdown even though there was no disciplinary reason. Mr. Nguyen was given very limited access to a telephone, legal materials, and recreational facilities.[8] After his attorney pre-arranged a visit through prison officials and traveled over four hours to interview Mr. Nguyen, she was unjustifiably denied access and forced to return the next day.[9] Due to long lines and limited visiting hours, the attorney was only able to meet with Mr. Nguyen for twenty minutes to help him prepare a request for release.[10] Mr. Nguyen's case illustrates how frequent transfers, the harsh conditions of detention, limited access to counsel, and the lack of timely custody reviews cause persons to be detained unfairly for years with little hope of release.

Case #2: Julio Martull-Garcia, a Cuban citizen and former lawful permanent resident, was detained by the INS in 1995 in the Victoria County jail in Texas after having been ordered removed in 1991 for alien smuggling.[11] In June 1999, the INS denied Mr. Martull's release request in a letter that stated simply

[7] L-148 (petition for writ of habeas corpus).

[8] L-149 (petition for writ of habeas corpus).

[9] L-149.

[10] L-149.

[11] L-142 (counsel's letter to INS).

that his release was not "warranted at this time."[12] In May 2000, Mr. Martull submitted a letter to the INS requesting a custody review interview.[13] In support of his request for release from custody, Mr. Martull submitted to the INS letters of recommendation from various jail personnel stating that he "displayed excellent behavior," had no disciplinary infractions, volunteered to help tutor ESL students, and completed an Alcohol Treatment program.[14] Mr. Martull has four young U.S. citizen children in need of his support.[15] The INS has failed to respond to Mr. Martull's request for release . He has now been detained for over five years. Mr. Martull's case demonstrates how the INS ignores strong equities in support of release.

Case #3: Kiet Van Le Nguyen, a native of Vietnam and former lawful permanent resident, was held at the INS Detention Facility in El Centro, California, after receiving a final order of removal.[16] In February 2000, a single INS deportation officer conducted a custody review interview of Mr. Nguyen. The purpose of the interview was to determine whether Mr. Nguyen had demonstrated that he was not a danger to the community or a flight risk and, therefore, could be released.

The interview consisted of the deportation officer asking Mr. Nguyen to confirm the contents of

[12] L-63 (INS decision).
[13] L-133 (counsel's letter to INS).
[14] L-142 (counsel's letter to INS).
[15] L-133 (counsel's letter to INS).
[16] L-157 (habeas petition declaration).

the officer's memorandum from a prior custody review summarizing Mr. Nguyen's criminal convictions.[17] The officer's notes during the interview consisted of a single sentence. Counsel for Mr. Nguyen objected to the summary nature of the interview and requested that the deportation officer allow Mr. Nguyen to explain the underlying facts and mitigating circumstances of his criminal history to demonstrate his non-violent character.

The deportation officer responded that he would not consider such information and that Mr. Nguyen would not be released due to his criminal convictions. The officer further stated that "zero" had changed regarding Mr. Nguyen's dangerousness and risk of flight and, therefore, he did not need to change or re-write his memorandum from the prior custody review.[18] Mr. Nguyen's case illustrates the unfairness of the INS custody reviews.

ARGUMENT

I. THE INS CUSTODY REVIEW PROCESS DOES NOT PROTECT PERSONS FROM EXCESSIVE DETENTION.

A. INS Fails to Conduct Timely Custody Reviews and Provide Proper Notice.

The government's position that its custody review procedures for indefinite detainees cure any

[17] L-157 (habeas petition declaration).
[18] L-158 (habeas petition declaration).

substantive due process concerns is not supported by the experience of the amici curiae counsel who represent persons in INS detention. Despite INS regulations, policy memoranda, and proposed regulations, the INS has consistently failed to provide fair and timely custody reviews for detainees with final orders of removal. The result has been that detainees languish indefinitely for years in INS detention.[19]

After the mandatory detention provision went into effect in 1997, detainees who had final removal orders, but who had not been deported after 90 days, requested custody reviews from the INS. The detainees sought the opportunity to demonstrate that they did not pose a risk to the community or a flight risk, and that the new law, therefore, mandated their release.

Initially, many INS officers refused to consider release of indefinite detainees and instead informed them incorrectly that they were "ineligible for any type of release"[20] and would be detained until they could be returned to their native countries.[21] The INS simply ignored other requests for custody reviews.[22] In some cases, the INS refused to consider release due to the detainee's criminal history, a rationale that prompted one INS officer to note in his custody review that INS

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[19] L-142 (counsel's letter to INS); L-144 (petition for writ of habeas corpus).

[20] L-65 (INS letter).

[21] L-66 (INS letter).

[22] In one case, the INS failed to respond to eight requests for a custody review submitted over the course of 19 months. L-160-161 (habeas petition declaration).

would be "keeping them in custody forever."[23]

INS Headquarters issued directives in the February 3, 1999 Pearson Memorandum,[24] the April 30, 1999 Meissner Statement,[25] and the August 6, 1999 Pearson Memorandum,[26] which required custody review decisions within 90 days of a final order of removal with subsequent custody reviews every six months. However, INS district offices largely continue to ignore these directives.[27] Most 90-day custody determinations are made well after 90 days has expired.[28] Furthermore, detainees routinely receive the subsequent six-month review long after six months has passed.[29]

In one of the most egregious examples of INS failure to perform timely custody reviews, Thanh Cao Nguyen, described above, waited over three years for

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[23] L- 64, 67 (INS letters).

[24] Memorandum from Michael Pearson, Exec. Assoc. Comm'r, Office of Field Operations, INS, "Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable" (Feb. 3, 1999), reproduced in 76 Interpreter Releases 428 (March 15, 1999).

[25] Statement by Doris Meissner, Comm'r, INS, "New Manadatory Review Policy for INS Long-Term Detainees (April 30, 1999), reported in 76 Interpreter Releases 717 (May 10, 1999).

[26] Memorandum from Michael Pearson, Exec. Assoc. Comm'r, Office of Field Operations, INS, "Interim Changes and Instructions for Conduct of Post-order Custody Reviews (Aug. 6, 1999), reproduced in 76 Interpreter Releases 1300 (August 30, 1999).

[27] L-73-74 (first custody review after two years of custody).

[28] Several documents submitted by counsel for the amici curiae and lodged with this Court have been redacted where the detainee did not want his or her identity disclosed. L-81, 86, 90 (counsel's letters to INS); L-45-46 (INS decision); L-70-71 (INS custody review worksheet).

[29] L-84, 86, 137 (counsel's letters to INS).

INS to provide any review of his custody status.[30] The INS's transferring Mr. Nguyen repeatedly around the country resulted in the INS simply losing track of him. The INS's systemic delays in providing reviews results in years of unnecessary detention of persons.

Frequently, INS provides less than half the 30-day notice required by the August 6, 1999 Pearson Memorandum to prepare for a custody review interview.[31] In other cases, the INS issues notices without a specific time or date, stating, for example, that the review will take place "on February 7 - 11, 2000 at: between 8:00 a.m. - 4:00 p.m."[32]

In addition, the INS routinely fails to provide notice to the attorney of record, which is especially prejudicial to non-English-speaking detainees since the notices it does provide are in English only.[33] The INS's failure to provide adequate notice of the reviews impedes counsel from representing their clients. By the time they do receive notice, they often have inadequate time to review their client's INS files, arrange for witnesses, obtain disciplinary records, prepare sponsorship letters, and obtain letters of support from the community.

B. INS Custody Reviews Lack Impartiality and Fairness.

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[30] L-150 (petition for writ of habeas corpus).

[31] L-20-22, 28 (INS interview notices).

[32] L-26 (INS interview notice).

[33] L-43, 68, 92 (INS decision; counsel's letter; and INS telefacsimile).

1. INS Officers Are Biased and Incompetent to Make Findings of Dangerousness.

The August 6, 1999 Pearson Memorandum requires the INS to conduct, alternately, one file review (without a detainee interview) and one interview review every six months. In practice, a lower level INS officer, generally a deportation officer, reviews the detainee's file, may conduct an interview, and makes a recommendation regarding custody. The decision whether to detain is then made by the district director or officer in charge of the facility where the detainee is housed.

As the case of Kiet Van Le Nguyen, described above, demonstrates, the INS officers responsible for conducting the custody reviews typically are biased in favor of continuing detention. The district directors then simply adopt the findings of the lower level officers. As one district court noted, "[d]ue to political and community pressure, the INS, an executive agency, has every incentive to continue to detain aliens with aggravated felony convictions, even though they have served their sentences, on the suspicion that they may continue to pose a danger to the community." *St. John v. McElroy*, 917 F.Supp. 243, 251 (S.D.N.Y. 1996). This failure to provide an impartial, independent decision maker deprives the detainee of the basic right to a fair, meaningful, and impartial review hearing. See, e.g., *Vo v. Greene*, 63 F.Supp. 2d 1278, 1287 (D. Col. 1999); *Phan v. Reno*, 56 F.Supp. 2d 1149, 1157-58 (W.D. Wash. 1999); *Ekekhor v. Aljets*, 979 F.Supp. 640, 644 (N.D. Ill. 1997).

Moreover, INS officers are not competent to make determinations regarding what type of dangerousness warrants continued detention under the regulations. In fact, INS officers who are not fully conversant in Spanish nevertheless routinely conduct custody review interviews in Spanish, furthering impairing their ability to make a meaningful assessment.[34] Interviewers do not include social workers, probation officers, or mental health professionals trained in the elusive criteria for predicting dangerousness.[35] See, e.g., Robert Menzies et al., *The Dimensions of Dangerousness Revisited: Assessing Forensic Predictions About Violence*, 18 Law & Hum. Behav. 1, 25 (1994).

In most of the indefinite detainee cases, criminal court judges, probation officers, prison authorities, and parole administrators have made determinations about rehabilitation and dangerousness.[36] These determinations are overridden by unguided INS employees.

Often, interview "panels" consist entirely of one INS employee who is untrained in conducting interviews or documenting the results of such interviews.[37] The INS bases release decisions on recommendations from an INS officer who is typically considering only the detainee's past criminal conduct. See, e.g., *Chi Thon Ngo v. INS*, 192 F. 3d 390, 398 (3d Cir. 1999)("the petitioner in this case was repeatedly denied

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[34] L-97 (comments on proposed custody review rules).

[35] L-97.

[36] L-97.

[37] L-157-159 (habeas petition declaration).

parole by INS officials based on no more than a reading of his file that listed years-old convictions").

This lack of a trained review panel combined with the inherent agency pressures to continue detention, stacks the deck against the detainee before the review process has even begun.

2. The INS Procedures Provide No Guidance Regarding What Constitutes a Danger to the Community.

The INS regulations and memoranda lack any guidance regarding what is considered to be a danger or what level of dangerousness is required to continue detention. This leaves detainees at a loss to know what kinds of evidence and how much of it will warrant release. The INS regulations and memoranda are equally silent regarding the level of likelihood that the detainee will be dangerous and whether such danger includes danger to property as well as persons.

The failure to describe the type, magnitude, or imminence of the danger that warrants continued detention leaves the detainee with a limited understanding of how to prepare for the custody review hearing. It is inappropriate for the INS to superimpose upon the sentence already served additional confinement for an indefinite period in order to prevent the possible commission of future, undefined types of offenses. *See Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. . .").

3. Lack of Programs in Detention Prevent

Detainees from Being Able to Prove Rehabilitation.

Seven of the nine non-exclusive factors INS considers in release decisions are, in large part, related to past criminal conduct that the detainee cannot change. See 8 CFR § 241.4. Of the other two, one is "[e]vidence of rehabilitative effort or recidivism," a factor over which the detainee would, presumably, have control. However, due to the lack of available rehabilitation programs in INS detention, indefinite detainees often find it impossible to present such evidence to INS review panels.[38]

One detainee had his request to take a correspondence course at his own expense denied by jail officials.[39] Another indefinite detainee in Florida made repeated requests to enter the detention facility's drug program, but was denied admission because he was an INS administrative detainee, rather than a criminal inmate.[40] After a custody review interview, the Miami INS district director denied release, stating, "[y]ou have not presented any evidence of making efforts to rehabilitate yourself though (sic) classes or programs while incarcerated."[41]

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[38] Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States*, Vol. 10, No. 1(G) (Sept. 1998) at 50, 83 (hereafter "Immigration Detainees in Jails") (visited Dec. 19, 2000) <http://www.hrw.org/hrw/reports98/us-immig/index.html>; *See also,* Michael Huspek, "A Case of Cruel or Unusual Punishment," *The San Diego Union-Tribune* (Dec. 16, 1999)(describing the conditions at one INS detention center as "nothing more than a holding tank.")

[39] *Immigration Detainees in Jails* at 50.

[40] L-75-78 (inmate request form).

[41] L-53a (INS decision).

4. Limited Access to Legal Counsel Impairs Representation at Custody Reviews.

Persons in immigration proceedings have no right to appointed counsel, despite the severe consequences that may result from such proceedings. The majority of indefinite detainees go through the custody review process without legal counsel. The remoteness of many detention facilities makes it difficult for detainees to obtain counsel.[42] Even for those with attorneys, frequent transfers of detainees often prevent the attorneys from being able to represent the detainee at the custody review interview.[43] Transfers far from a detainee's home community also prevent witnesses from being able to appear at the interviews. Despite this, the INS has ignored requests by counsel not to transfer clients and regularly fails even to notify attorneys when such transfers have taken place.[44]

5. Limited Access to Information Impairs Detainees' Ability to Prepare for Custody Reviews.

Detainees frequently have limited access to the INS deportation officers who are handling their cases or to their immigration files.[45] Often detainees have no idea what information the INS is relying upon to deny

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[42] *Immigration Detainees in Jails* at 83.

[43] *Immigration Detainees in Jails* at 79-80.

[44] L-131-132 (counsel's letter to INS).

[45] *Immigration Detainees in Jails* at 5; Florida Immigrant Advocacy Center, *Florida County Jails: INS's Secret Detention World* (Nov. 1997) at 18 (visited Dec. 19, 2000)<http://www.fiacfla.org/>(hereafter "Florida County Jails").

release.[46] Where INS officers rely upon police reports and detention disciplinary records without the detainee's knowledge, detainees have no opportunity to rebut often one-sided and inaccurate information.

Detainees in local jails may be hundreds of miles from the INS officer in charge of their cases, and the INS officers routinely fail to respond to requests for information. This lack of information and communication significantly impairs the ability of detainees, or attorneys on their behalf, to prepare their cases in the custody review process. Pro se detainees are even further hampered since they are typically provided only limited access to law libraries, and these libraries often contain outdated or irrelevant materials.[47]

C. INS Custody Decisions Are Arbitrary and Lack Genuine Consideration.

1. INS Fails to Serve Detainees With Notice of Custody Decisions Within Thirty Days of Review.

The August 6, 1999 Pearson Memorandum requires the INS to serve custody decisions on detainees within 30 days of a custody review. However, many detainees wait months after the

[46] L-162-171 (*In re Lon Hoa Chau* (A-28-019-256)(8-31-00); *In re Minh Van Nguyen* (A-70-973-977)(8-23-00); *In re Quang Huy Trong Nguyen* (A-73-255-353)(8-17-00); *In re Mohd Ribhe Mahmoud* (A-29-253-126)(6-12-00); *In re Chhan Khung* (A-25-362-027)(5-11-00).

[47] *Immigration Detainees in Jails* at 67.

custody review for a custody decision.[48] After INS officers make a custody decision, they may wait several more weeks before actually serving the decision upon the detainee.[49] This results in detainees sometimes receiving a denial of release within days of the subsequent six-month review.[50]

The late decisions often arrive undated and with no proof of service.[51] In some instances, the proof of service is dated well before the detainee actually receives personal service.[52] In addition, the INS consistently fails to notify the detainees' attorneys of the custody decisions.[53] Many Board of Immigration Appeals (BIA) decisions complain about the lack of proofs of service to counsel in the record on appeal.[54]

Due to the fact that detainees have only ten days to appeal an adverse custody determination to the BIA, these INS practices impede that right.[55] In one case of a detainee represented by amici, the INS transferred the man out of state shortly after his lawyer had entered an appearance for him during a custody review interview.[56] Thereafter, in the span of three months, the INS transferred the detainee four times to detention

[48] L-114-115, 120 (counsel's letters to INS).

[49] L-41-42 (INS decision and proof of service).

[50] L-19, 35 (INS notice and decision).

[51] L-29-34 (INS decisions).

[52] L-134-136 (counsel's letter to INS).

[53] L-131 (counsel's letter to INS).

[54] L-162-163, 166-167 (*In re Lon Hoa Chau* (A-28-019-256)(8-31-2000); *In re Quang Huy Trong Nguyen* (A-73-255-353)(8-17-00)).

[55] 8 C.F.R. § 236.1(d)(2)(ii), (d)(3)(iii).

[56] L-131 (counsel's letter to INS).

facilities in Florida, Louisiana and Tennessee.[57] The INS never notified counsel that his client had been transferred. After requesting information about his client from an INS supervisor, the INS informed the lawyer that his client's release request had been denied, although they had no record of the decision or information about the date it was rendered.[58] The INS further informed the lawyer that they did not know of the detainee's whereabouts and referred the lawyer to the INS in New Orleans, despite the fact that the last correspondence from the detainee was from Tennessee.[59]

2. INS Headquarters' Reviews of Panel Review Decisions Are Seriously Delayed and Simply Rubberstamp the "Preliminary Decision."

The August 6, 1999 Pearson Memorandum states that all interview review "preliminary decisions" will be reviewed by INS Headquarters. However, in the experience of amici, the "Headquarter's Review" serves as nothing but a rubberstamp of the district director's preliminary decision, and further delays the "final decision" for several months.[60]

In addition, despite the fact that the INS Headquarter's review takes many months, the final decision that is served on the detainee does not include any information regarding the Headquarter's review or

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[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] L-43, 68 (INS preliminary decision and INS letter regarding Headquarters review).

findings.[61] In some cases, the final decision is simply a photocopy of the preliminary decision with the box "final decision" checked.[62]

Detainees are required to file appeals of INS custody decisions to the BIA within ten days of service of the decision. See 8 C.F.R. § 236.1(d)(2)(ii), (d)(3)(iii). The appeal form must be sent to the INS district director for forwarding to the BIA. However, the INS refuses to forward appeals to the BIA until after the Headquarter's review and final decision has been issued.[63] Thus, the Headquarter's review serves only to delay the detainee's right to appeal.

3. INS Decisions Fail to Identify Reasons for Denying Release.

The regulations state that the detainee need demonstrate only two factors to be released: 1) he or she is not a danger to the community, and 2) he or she is not a significant flight risk. 8 C.F.R. § 241.4 The regulation identifies a non-exhaustive list of factors that the district director may consider in making a determination.

Although the August 6, 1999 Pearson Memorandum requires INS district directors to weigh "favorable and adverse" factors and clearly delineate the reasons in support of a decision denying release, the decisions often state no reasons. Detainees receive cursory decisions containing such statements as: "I am unable to conclude that your release from custody is

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[61] L-36-40, 53, 57-60 (INS decisions).

[62] L-36-40 (INS preliminary and final decisions).

[63] L-69 (INS letter).

warranted at this time."[64]

The BIA has commented in numerous remands of such decisions that the INS failed to articulate any basis for concluding that the detainees should remain in detention.[65] Such decisions leave detainees with no meaningful opportunity to contest the factual accuracy and legal analysis of the factors considered or to prepare for the subsequent six-month custody review. *Matter of Daryoush*, 18 I&N Dec. 352, 353 (BIA 1982).

4. INS Ignores Detainees' Equities in Favor of Release.

The INS often impermissibly ignores evidence submitted by detainees that demonstrates strong family and community ties, work history, payment of taxes, sponsorship offers by social service agencies, employment offers, and even release plans assembled by federal and state law enforcement agencies working with social services agencies.[66]

One federal court, in finding that the INS's detention of a habeas petitioner was "arbitrary and capricious," noted the petitioner's "strong family ties, an offer of employment and a good record of complying with probation and required counseling."[67] The court ruled that the INS failed to take into full account the factors in favor of the petitioner's release in its "cursory" decision. The INS district director's

[64] L-44, 61-62 (INS decisions).

[65] L-166-168, 170-171 (*In re Quang Huy Trong Nguyen* (A-73-255-353)(8-17-00); *In re Chhan Khung* (A-25-362-027)(5-11-00)).

[66] L-125 (counsel's letter to INS).

[67] L-178 (Order, U.S. District Court, S.D.Fla. CIV-00-3262 (11-2-00)).

decision stated simply that due to the detainee's conviction the INS was "unable to conclude that you established by clear and convincing evidence that you do not pose a threat to society as well as a flight risk if released."[68]

5. INS Makes Boilerplate Findings of Dangerousness or Flight Risk.

The failure of the INS to provide any real consideration of the individual factors in detainee custody reviews is most evident in its practice of issuing boilerplate decisions finding that the detainee is a danger to the community or a flight risk. The BIA repeatedly has remanded custody decisions criticizing the district directors' issuance of "generic" form letters that contain nothing more than a summary of the detainee's criminal history - a factor which the detainee cannot change.[69]

In some of the more egregious cases, the decisions denying release actually pre-date the custody reviews.[70] The haste with which the INS considers detainees' cases results in decisions plagued with serious and significant factual errors. In finding that the INS had abused its discretion in reviewing the case of a Cuban detainee in Miami, a federal court noted that the INS decision mistakenly listed the commission of the detainee's crime seven years later than it had occurred, indicated that the detainee's record "reflects

[68] *Id.*

[69] L-162-167 (*In re Lon Hoa Chau* (A-28-019-256)(8-31-00); *In re Minh Van Nguyen* (A-70-973-977)(8-23-00); *In re Quang Huy Trong Nguyen* (A-73-255-353)(8-17-00).

[70] L-24, 25, 54, 55 (INS notices of review and decisions).

disciplinary problems" though none were identified, and stated that no probation history or prison disciplinary records were available despite the detainee's contention that he had successfully completed probation, had a perfect court appearance record, and no disciplinary problems.[71]

Other cases have been remanded by the BIA because the decision finding dangerousness and flight risk "merely lists the respondent's criminal convictions and concludes that the respondent is a danger to society."[72] Federal courts have granted habeas relief on the basis that such decisions violate procedural due process. *Duong v. INS,* Case No. 99 CV1965-J (S.D. Cal. Mar. 17, 2000) at 1067. Such decisions eternally condemn persons to detention for a criminal history that can never be erased. *Chi Thon Ngo v. INS*, 192 F.3d 390, 398 (3rd Cir. 1999)("Due process is not satisfied. . . by rubberstamp denials based on temporally distant offenses.")

II. THE INS PROPOSED RULES FAIL TO ADDRESS THE DEFICIENCIES IN THE CUSTODY REVIEW PROCEDURES.

The proposed rules, published on June 30, 2000, regarding post-final order custody reviews simply codify the same procedures outlined in the INS memoranda that have failed to guarantee procedural protections to detainees.[73] However, the proposed

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[71] L-191, 192 (Order, U.S. District Court, S.D.Fla. CIV-00-0046 (8-24-00).

[72] L-168 (*In re Mohd Ribhe Mahmoud* (A-29-253-126)(6-12-00)).

[73] 65 Fed. Reg. 40540-48 (June 30, 2000).

rules further erode the minimal protections under current procedures by eliminating BIA review of INS decisions. Under the proposed rules, only INS Headquarters officials will review the custody decisions of INS district directors, thereby completely insulating the review process.

The BIA repeatedly has found that INS officials abused their discretion in inconsistent and arbitrary decisions to continue detention.[74] The INS has demonstrated that it is incapable of acting in a fair, neutral manner when interpreting custody regulations and making release decisions. For over a year, the INS denied detainees the right to appeal custody decisions if the INS had rendered the decision prior to the detainee's submitting a formal, written request for review.[75] The practice only stopped when the BIA ruled that there was no such requirement in the regulations. *See In re Saelee*, Int. Dec. #3427 (BIA 2000). The proposed rules eliminate detainees' sole right to an outside review of INS decision-making.

The proposed rules also fail even to mention any types of alternatives to INS detention facilities, prisons and local jails, despite the fact that studies contracted by the INS clearly demonstrate that there are other cost effective options that could also accomplish protection of the community.[76] The proposed rules, therefore,

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[74] L-97 (comments on proposed custody review rules).

[75] L-79 (Office of Immigration Litigation letter).

[76] *"Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program,"* (2000 Report)(visited Dec. 19, 2000) <http://www.vera.org/aap/index.html>; *See also, Needless Detention* at 26-27.

codify the most extreme form of restraint on the alien's liberty as the only option.

Finally, the proposed rules' transfer of final custody review decision-making authority to INS Headquarters adds no procedural protections. Rather, as the reviews by INS Headquarters have already demonstrated, such a transfer of authority serves only to further delay detainees' custody decisions and to rubberstamp district director decisions.

III. THE UNFAIRNESS OF THE CUSTODY REVIEW PROCESS SUBJECTS PERSONS TO TREATMENT MORE HARSH THAN CRIMINAL INCARCERATION.

A. Persons in Administrative Detention Are Treated Worse Than Criminals.

Although INS detainees are in administrative -- as opposed to criminal -- detention, they are held in local jails, prisons, and prison-like detention centers, many of which are not designed for long-term detention. The facilities include nine "service processing centers" operated by the INS,[77] four contract facilities operated by private corporations,[78] several

[77] These service processing centers are located in Aguadilla, Puerto Rico; Buffalo, New York; El Centro, California; El Paso, Texas; Florence, Arizona; Miami, Florida; Los Fresnos, Texas; San Pedro, California; and New York, New York.

[78] INS has contracts with Wackenhut and Corrections Corporation of America to hold INS detainees in Aurora, Colorado; Houston, Texas; Seattle, Washington; Laredo, Texas; and Elizabeth, New Jersey.

Bureau of Prisons facilities,[79] and hundreds of county and city jails.[80] The majority of INS detainees are held in state and local jails under contract agreements with the U.S. government.[81]

In the experience of the amici, the treatment of their clients in INS custody is often particularly harsh and significantly interferes with their ability to obtain fair custody reviews. This experience is matched by the reports of human rights organizations, as well as other branches of the Justice Department, regarding detention conditions. On March 30, 2000, the Civil Rights Division of the U.S. Department of Justice issued findings in its investigation of conditions at the Jackson County Correctional Facility in Florida.[82] INS detainees were held at this county jail until 1998, when detainees reported that jail personnel had severely mistreated them by excessive use of an electronic or "stun" shield, as well as a four-point restraint that involved strapping a detainee's wrists and ankles to a cement block platform. The report supported the detainees' allegations, concluding that the facility was deficient in the areas of "access to counsel, medical and mental

[79] These facilities are principally in Oakdale, Louisiana and Eloy, Arizona.

[80] *Immigration Detainees in Jails* at 16.

[81] Detention in state and local jails is accomplished through intergovernmental service agreements (IGSAs) between the INS and local governments, or between the Federal Marshals Service and local governments, with INS "piggy-backing" on to the agreements. Often, private corporations operate the local and state facilities. *Florida County Jails* at 6.

[82] L-1-19 (Letter from Acting Assistant, Attorney General, Civil Rights Division to Chair, Board of County Commissioners, Jackson County (Mar. 30, 2000))(hereafter, "Dept. of Justice Letter").

health care, use of force, security and protection from harm, fire safety and lack of exercise."[83]

In 1998, Human Rights Watch issued a detailed report that found that INS does not ensure "humane conditions and treatment" in the local jails that hold INS detainees.[84] Medical and dental care often is substandard; detainees have limited access to legal representatives, family and friends; and language barriers prevent jail staff from communicating with INS detainees. Recently, the Women's Commission for Refugee Women and Children issued a report on conditions at the Krome Service Processing Center in Miami, Florida. The report describes incidents of sexual abuse of women detainees by Krome officers, limited access to counsel, inadequate interpretation sources, a lack of recreation and educational opportunities, and inferior health care and hygiene.[85]

B. INS Long-Term Detainees are Often Held in Remote Locations, Transferred Frequently, and Have Difficulty Gaining Access to Counsel.

INS holds its detainees wherever space is available, without regard to location of the detainees' families or the availability of pro bono or private legal counsel.[86] Many of the facilities in which INS detains

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[83] *Id.* at 2.

[84] *Immigration Detainees in Jails* at 5.

[85] Women's Commission for Refugee Women and Children, *Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center* (Oct. 2000) (hereafter, "*Behind Locked Doors*"), http://www.theirc.org/wcrwc/reports/wc_krome_10.00.html.

[86] *Immigration Detainees in Jails* at 18 and 64.

individuals are in remote locations.[87] INS compounds the effect of isolation by frequently transferring detainees, often across state lines.[88] As a consequence of the frequent transfers, detainees often lose their personal property, including legal papers and documents needed to support their cases for release.[89]

Access by attorneys to INS detainees is also a persistent problem.[90] For example, at Krome Service Processing Center in Miami, one of the largest INS detention centers, overcrowding results in attorneys having to wait hours for clients to be brought to the visitation area. More important, attorney-client conversations can easily be overheard by INS staff. There are not enough visitation booths, and they are too small to accommodate both an attorney and interpreter.[91] Access to counsel is further hampered by telephone and mail restrictions and other bureaucratic impediments to attorney visitation.[92] All of these factors greatly impede the ability of attorneys to adequately prepare detainees for reviews of their custody status.

C. The Punitive Nature of INS Detention Impairs Detainees' Ability to Seek Release.

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[87] *Immigration Detainees in Jails* at 64.

[88] *Immigration Detainees in Jails* at 79-81.

[89] *Immigration Detainees in Jails* at 50-51.

[90] *Immigration Detainees in Jails* at 63.

[91] *Behind Locked Doors* at 16-17.

[92] *Immigration Detainees in Jails* at 66-67; L-128-130 (counsel's letter to Coleman Prison Warden).

In the experience of amici, many INS detainees suffer from harm and excessive use of force at the hands of INS guards and local jail personnel. After calls for an investigation of INS detainees at a Jackson County, Florida jail, the Civil Rights Division of the Department of Justice found that jail officials "engage in excessive and unwarranted use of restraints to control inmates, causing serious risk of bodily harm."[93]

Human Rights Watch has reported allegations of excessive disciplinary sanctions and mistreatment of INS detainees at three local jails. One incident involved a detainee who was taken to solitary confinement after he said he was going to file a complaint against certain jail officials. The detainee was handcuffed, then hit and kicked in the head and arms by four jail officers.[94] Most recently, the Women's Commission for Refugee Women and Children issued a report describing incidents where female detainees at Krome Service Processing Center in Miami, Florida were sexually harassed and abused by INS personnel.[95]

INS detainees are often subjected to arbitrary or excessive disciplinary sanctions.[96] Segregation is often used punitively and sometimes for transgressions resulting from mental illness or language difficulties. Records of these types of sanctions are then used against detainees during custody reviews.

No meaningful grievance procedures exist, and

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[93] L-9 (Dept. of Justice Letter).

[94] *Id.*

[95] *Behind Locked Doors* at 7-9.

[96] *Immigration Detainees in Jails* at 69.

some detainees have been threatened with transfer if they ask to file a grievance.[97] Detainees' detention and disciplinary records often present one-sided, exaggerated, and even false versions of events.[98] Detainees' explanations and attempts to correct their records during custody reviews are summarily dismissed.[99] The hopelessness and despair detainees experience is reflected in the frequent hunger strikes and suicide attempts.[100]

D. No Enforceable Standards Govern INS's Treatment of Detainees.

No statutory provision governs the INS's treatment of its detainees. The only applicable regulatory provision provides minimal detention standards, namely 24-hour supervision, conformance with safety and emergency codes, food services, and the availability of emergency medical care. 8 CFR § 235.3(e).

On November 13, 2000, as a result of advocacy efforts led by the American Bar Association, the INS announced the issuance of written standards for facilities housing INS detainees, which address such issues as attorney access and the availability of legal materials.[101] However, the INS refused to issue the

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[97] *Immigration Detainees in Jails* at 72; Florida Immigrant Advocacy Center, Inc., "*Krome's Invisible Prisoners: Cycles of Abuse and Neglect*" (July 1996) at 26 (visited Dec. 19, 2000) <http://www.fiacfla.org/>.

[98] L-123-125 (counsel's letter to INS).

[99] *Id.*

[100] *Needless Detention* at 2.

[101] *Detention Operations Manual* (visited Dec. 19, 2000) < http://www.ins.usdoj.gov/graphics/lawsregs/guidance.htm>.

standards as enforceable regulations. In addition, the standards do not take effect immediately in state and local jails where most detainees are kept. They do not mandate rehabilitation programs or the provision of other than collect-call telephones for detainees. Most important, the rules fail to address the serious problem of constant detainee transfers around the country and the lack of notice to counsel of such transfers.

CONCLUSION

For the above stated reasons, counsel for the *amici curiae* respectfully urge that the decision of the Court of Appeals of the Ninth Circuit be affirmed.

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APPENDIX A

ORGANIZATIONAL STATEMENTS OF INTEREST

The American Immigration Law Foundation (AILF)

AILF is a nonprofit organization established in 1987 to increase public understanding of immigration law and policy, promote public service and professional excellence, and advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration.

The American Immigration Lawyers Association (AILA)

AILA is a national nonprofit association of immigration and nationality lawyers. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than 6,000 members organized in 34 chapters across the United States and in Canada. AILA's members clients are directly affected by the decision in this case.

Lawyers' Committee for Civil Rights Under Law of Texas

The Lawyers' Committee for Civil Rights is part of a national network of nonpartisan, nonprofit law firms founded in 1963 to provide legal services to victims of discrimination. The Texas Lawyers' Committee, founded in 1991, is committed to attaining and

preserving civil rights for immigrants and refugees throughout the state. Immigration detention is a high priority of the Lawyers' Committee. In particular, the Lawyers' Committee is very concerned about the indefinite detention of immigrants under a final order of deportation, and its lawyers have represented dozens of these individuals in administrative custody reviews before the INS.

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